No. 12567

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRED QUON, *et al.*,

Appellants,

vs.

NIAGARA FIRE INSURANCE COMPANY OF NEW YORK, *et al.*,

Appellees.

APPELLEES' BRIEF.

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Appellees' Statement of the Case.

Appellants brought this action against Appellees by filing on March 1, 1948, their complaint in the Superior Court of the State of California, in and for the County of Imperial. Appellees removed, for diversity of citizenship, the action to the United States District Court, Southern District of California, and filed answer therein.

Appellants, in their complaint, sued Appellees upon seven separate policies of fire insurance issued by the several Appellees and alleged a loss by fire occurring to the property described in the said policies, which loss by fire occurred on May 27, 1946.

Appellees' answer put in issue the material allegations of the complaint and pleaded, *inter alia,* that Plaintiffs had not commenced their action within the time provided for in the California statutory fire insurance policy, and this was the defense upon which the Court ordered judgment for Appellees.

Appellants, conceding their failure to comply with the requirements of the statutory policy by commencing their action within fifteen months next after the fire, alleged certain facts which they claimed estopped Appellees from relying upon this statutory limitation. The District Court found against Appellants on these allegations of estoppel.

Statement of Facts.

The undisputed facts, and as found by the trial court, show the following:

All of the policies of insurance sued upon by Appellants, with the exception of one, were countersigned and delivered to Appellants by one Herbert Loudermilk, local agent at El Centro, California; one policy of Appellee, Niagara Fire Insurance Company, was countersigned and delivered to Appellant Quon by Carey Brothers, local agents at Brawley, California.

On the day following the fire Appellant Quon was notified by these two local agents that one Carl Quigg, an independent adjuster, had been appointed by all of the Appellee companies to act as their sole adjusting representative with reference to their insurance policies and the loss by fire. [Tr. Vol. I, p. 14, lines 14-19; p. 60,

lines 22-26.] The second day following the fire, Mr. Quigg met Appellant, Quon, and, after review of the premises and some preliminary discussion, was advised by Quon that he had employed as counsel one S. P. Williams, a practicing attorney in El Centro, California. Quon notified Quigg that all negotiations with reference to the insurance and the fire were thereafter to be had with the said S. P. Williams. Within three days after the fire, the Appellants and their attorney were advised and knew that said Carl Quigg was the sole adjusting representative of the Appellees to act in all maters and things in relation to the loss by fire and the contracts of insurance. [Tr. Vol. I, p. 61, lines 1-12.] After the employment of Mr. Williams as his counsel, Mr. Quon did not talk with Mr. Quigg at any time. [Tr. Vol. II, p. 81, line 25, to p. 82, line 3.]

Following the employment of Mr. Williams as Appellants' attorney, Mr. Quigg, upon the claim of the Appellants that the policies of insurance had been destroyed in the fire, furnished Mr. Williams with copies of the policies, that is, the daily reports showing all of the policy except the statutory provisions. Mr. Williams, on July 26, 1946, served upon Mr. Quigg, as the adjusting representative of the Defendants, preliminary Proofs of Loss, and, Mr. Quigg objecting to the forms of these Proofs, Mr. Williams, as Appellants' attorney, served on Mr. Quigg on August 9, amended Proofs of Loss, and on August 30, 1946, Mr. Quigg rejected these Proofs of Loss in writing and notified Appellants, through their attorney, that

he disagreed with the loss claimed in said preliminary Proofs of Loss and did not admit any loss, and further advised in said letters that the Defendants, and each of them, did not admit or deny liability under the policies, and that the Defendants, and each of them, *did not waive and should not be deemed to have waived any of the terms or conditions of the policies, or of any of them, or of any forfeiture thereof but the same were specifically reserved.* [Tr. Vol. I, p. 61, line 14, to p. 62, line 12; Pltfs. Exs. 1D, 2D, *et al.*] Following the letter of August 30, 1946, Mr. Quigg received no response thereto, and neither Mr. Quon nor Mr. Williams ever further communicated with him, Quigg, until sometime in November of 1947, when Quon telephoned Mr. Quigg in San Diego and was advised that the companies were not going to pay. [Tr. Vol. II, p. 142, lines 14-26; p. 65, lines 16-26.] Within a few days thereafter, *i. e.,* about the middle of November, 1947, Appellants employed an attorney, Mr. Clarence Smith, of El Centro, to handle the matter but no action was commenced until the present action was commenced on March 1, 1948.

Argument.

Appellants' whole case on this appeal, as indicated by their Specification of Errors, is an attack upon the trial court's Findings of Fact and the conclusions therefrom, yet nowhere do Appellants give this Court the entire evidence on any fact, nor do they point out where such isolated bits of testimony as they quote was destroyed by cross-examination or subsequent admissions, or impeached, nor do they make any attempt to aid the Court by a complete review of the evidence on any point, or to state clearly their grounds on any point, but apparently are content to make a sort of a jury argument without reference to the facts.

The foregoing statement of facts of Appellees is a literal statement of all the material evidence and all of the transactions had by or with any authorized persons, either by Appellants or Appellees.

Appellants' method of approach makes it necessary for Appellees to discuss incompetent testimony that was finally rejected by the Court, to discuss evidence upon which the trial court made findings adverse to Appellants because of contradictions, explanations and impeachment or from which the trial court, within its province as a trier of fact, drew conclusions of fact adverse to Appellants.

Before discussing the evidence, however, we believe that in the interest of a logical approach the foundation upon which the trial court rendered its judgment, and the law applicable, should be stated.

Each of the policies sued on contained the following provision made mandatory by the Code (Cal. Ins. Code, Secs. 2070-2071):

> "No suit or action on this policy for the recovery of any claim shall be sustained, until after full compliance by the insured with all of the foregoing requirements, nor unless begun within fifteen months next after the commencement of the fire."

The fire commenced on the 27th day of May, 1946, but Appellants did not commence any suit or action upon the policies until March 1, 1948, over twenty-one (21) months after the commencement of the fire.

There can be no question of the validity and enforcibility of this provision, not only because it is a mandatory statutory provision, but also because the courts have unanimously upheld its validity. Indeed, Appellants recognize the validity of the clause and its enforcibility by alleging in their complaint that they have performed and complied with all the terms and provisions contained in said policies on their part to be kept, performed, and complied with excepting the institution of action within fifteen months from the commencement of the fire, as above stated." [Tr. Vol. I, p. 23, lines 12-16.]

Since it is apparent that Plaintiffs have not and cannot attack the validity of the clause, we are citing but a few of the many cases.

Tebbets v. F & C Co., 155 Cal. 137, 99 Pac. 501;

Harlow v. American Equitable Ins. Co., 87 Cal. App. 28, 261 Pac. 499;

Fageol Truck & Coach Co. v. Pacific Indemnity Co., 18 Cal. 2d 748, 117 P. 2d 669;

Genuser v. Ocean Accident & Guaranty Corp., 57 Cal. App. 2d 979, 135 P. 2d 670;

Olds, etc. v. General Accident F & L Assn., 67 Cal. App. 2d 813, 155 P. 2d 676;

Gifford v. Travelers Protective Assn., 153 F. 2d 209 (9th Cir., Jan. 26, 1946).

The Appellants knew the policies were statutory policies [Tr. Vol. I, p. 15, lines 10-15] and knew the provision requiring suit to be brought within fifteen months after the fire, and are conclusively presumed to know, because not only are they presumed to know the provisions of the instrument upon which they sue and by suing are conclusively presumed to have contracted with reference to it (*Hill v. London Assurance Corp.*, 12 N. Y. Supp. 86), but also because the policy is a statutory form and they must conclusively be presumed to have entered into it with reference to the statutory provisions.

See:

Harlow v. American Equitable Ins. Co., 87 Cal. App. 28, 261 Pac. 499;

Kavanaugh v. Franklin Fire Ins. Co., 185 Cal. 307, 197 Pac. 99.

Appellants' Attempt to Invoke a Waiver or Estoppel Against Appellees.

Appellants, recognizing that they, although suing upon written instruments, have not brought themselves within the terms of the instrument sued upon, have attempted without any evidence whatsoever to invoke a waiver or an estoppel against Appellees to avoid the effect of the above quoted policy provision. While Appellees are willing to concede that, under proper circumstances, a con-

tractual or even a statutory right may be waived or a party be estopped to rely upon it, they are certain beyond a doubt that in this case there is absolutely no waiver of the above provision shown or no facts upon which an estoppel against Appellees can be found to prevent them from relying upon this plain statutory provision.

Before a discussion of the facts, we believe it desirable to examine the fundamental principles of waiver and estoppel and to quote the settled rule regarding the necessary evidence from which either waiver or estoppel can be found.

In this case there is absolutely no evidence of an express waiver by the Appellees of the provision of the policies requiring the suit to be brought within fifteen months after the fire and the trial court so found. [Tr. Vol. I, p. 64, lines 10-14.] On the contrary, the undisputed evidence is that the Appellees refused to waive this or any other of the terms or conditions of the policies and on August 30, 1946, in writing by several letters relating to each of the policies, notified the Appellants, through their attorney, that they: "shall not be deemed to have waived any of the terms or conditions of said policy of insurance, or of any forfeiture thereof, but the same are hereby specifically reserved." [Pltfs. Ex. 1D, *et al.*]

A "waiver" has been defined as an intentional relinquishment of a known right, and here in this case there was not only no relinquishment of the right, but an insistence in writing upon a reliance thereon.

As stated in *Reynolds v. Detroit Fidelity & Surety Co.*, 19 F. 2d 110:

> "The burden of proof is upon the party claiming a waiver to prove it. * * * In the absence of conduct creating an estoppel, a waiver must be supported

by an agreement founded upon a valuable consideration. There can be no waiver unless so intended by one party and so understood by the other, but when a party has so acted as to mislead the other he is estopped thereby. 40 Cyc. 261; *Hasler vs. West India S. S. Co.* (C. C. A. 2), 212 F. 862, 867."

Again, in the case of *Dahrooge v. Rochester-German Ins. Co.,* 143 N. W. 608, the Court said:

"It is further contended in plaintiffs' behalf that the time for bringing action was extended by waiver, or estoppel, arising from negotiations for settlement, extending from the date of the fire in October until the following July, during which time defendant's adjuster gave repeated assurances that the loss would be paid. It has been said that a waiver must arise either by express agreement, a new promise to pay, a part payment, or a failure to plead. A waiver is a voluntary relinquishment of a known right. Estoppel is based on some misleading conduct or language of one person, which, being relied on, operates to the prejudice of another, and is applied to the wrongdoer by the court in denial of some right, which otherwise might exist, to prevent a fraud. The claim of plaintiffs in this case seems rather to suggest an estoppel, though in insurance cases the terms are freely used interchangeably, and it is sometimes expressed as waiver by estoppel."

Again, in the case of *McDaniels v. General Insurance Co.,* 1 Cal. App. 2d 454, 460, 35 P. 2d 394, the Court said:

"To constitute a waiver there must be an existing right, a knowledge of its existence, and an actual intention to relinquish it, or such conduct as warrants an inference of the relinquishment. It is a voluntary act and implies an abandonment of a right or privilege

> —an election to dispense with something of value or to forego some advantage which one might, at his option, have demanded or insisted upon. In no case will a waiver be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has meen misled, to his prejudice, into the honest belief that such waiver was intended or consented to. (25 Cal. Jur. 926-928.)"

Since there is absolutely no evidence of any express waiver, we will treat Appellants' claim of waiver as another name for estoppel, as the courts have frequently done, and cite a few of the many cases defining the express nature of an estoppel and the elements necessary to establish the same before discussing the alleged facts upon which Appellants base their claim.

As said by the United States Supreme Court in *Globe Mutual Ins. Co. v. Wolff,* 5 Otto 326, 95 U. S. 333, 24 L. Ed. 387:

> "The doctrine of waiver, as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct and enforce the conditions. To a just application of this doctrine it is essential that the companies sought to be estopped from denying the waiver claimed should be apprised of all the facts: of those which create the forfeiture, and of those which will necessarily influence its judgment on consenting to waive it."

The Supreme Court of California in *Wheaton v. Insurance Co.*, 76 Cal. 415 (18 Pac. 758), at page 429, said:

"The waiver spoken of in the instruction is another term for estoppel. There can be no estoppel where the facts are not known, as no one can be presumed to have waived that the existence of which he has not known. (*Finley vs. Lycoming Co.*, 30 Pa. St. 311; 72 Am. Dec. 705; *Forbes vs. Agawam Co.*, 9 Cush. 470; *Allen vs. Vermont Co.*, 12 Vt. 366; *Biddle Boggs vs. Merced Co.*, 14 Cal. 279.) And the facts proved must be such that an estoppel is clearly deductible from them. *Estoppels are not favored.* (*Franklin Co. vs. Merida*, 35 Cal. 558.)" (Italics ours.)

"The representation, whether by word or act, to justify a prudent man in acting upon it, must be plain, not doubtful or matter of questionable inference. *Certainty* is essential to all estoppels. (Bigelow on Estoppel, 559.)"

And, again, on page 431, said:

"In cases like the present it must appear that the insured was misled to his prejudice; and where no act has been done, or left undone by the insured, in reliance on the act or non-action of the insurer, there can be no estoppel. (May on Insurance, Sec. 507; *McCormick vs. Springfield Co., supra.*) The acts or declaration must have influenced the conduct of the other party to his injury. (*Boggs vs. Merced Company, supra.*) An estoppel can never arise by implication alone, except by some conduct which induces action in reliance upon it to an extent which renders it fraud to recede from what the party has been induced to expect. (*Security Co. vs. Fay*, 22 Mich. 467; 7 Am. Rep. 670.) An equitable estoppel is only called into existence for the prevention of wrong and redress of injury. There must be some

element of wrong in the action of the party creating it. He must know, or have sufficient reason to believe, that another party will place himself in a different position, or subject himself to additional injury in consequence of the action or representation."

In *Hartford Fire Ins. Co. v. Small,* 66 Fed. 490, the Court said:

"On a question of a waiver of an express condition of a written contract or a consent that such condition need not be complied with after a breach of the condition has been made by the insured, there must be evidence that the subject-matter of the waiver and consent was in the minds of the parties at the time, and that it was consciously and purposely done by the minds of the parties coming together upon the definite proposition."

And in *Bennecke v. Insurance Company,* 105 U. S. 355, 26 L. Ed. 990, the Court said:

"A waiver of a stipulation in an agreement must, to be effectual, not only be made intentionally, but with knowledge of the circumstances. This is the rule when there is a direct and precise agreement to waive the stipulation. A *fortiori* is this the rule when there is no agreement either verbal or in writing to waive the stipulation, but whether it is sought to deduce a waiver from the conduct of the party. Thus, where a written agreement exists, and one of the parties set up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for a written agreement, he must clearly show not merely his own understanding, but that the other party had the same understanding."

The elements of estoppel are clearly set forth in the case of *Rice v. California-Western States Life Insurance Co.,* 21 Cal. App. 2d 660, page 668, 70 P. 2d 516, as follows:

"The four elements necessary to constitute equitable estoppel are thus set forth in *Jones vs. Coulter,* 75 Cal. App. 540 (243 Pac. 487), an action to quiet title to real property:

" 'The facts necessary to be shown in order to call into exercise the principles of equitable estoppel are stated by Chief Justice Field in *Biddle Boggs vs. Merced Min. Co.,* 14 Cal. 279, 367, as follows: ". . . *first,* that the party making the admission by his declarations or conduct was apprised of the true state of his own title; *second,* that he made the admission with the express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud; *third,* that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge; and, *fourth,* that he relied directly upon such admission, and will be injured by allowing its truth to be disproved." ' (See, also *City of Los Angeles vs. Babcock,* 102 Cal. App. 571, (283 Pac. 314).)

"In *Nilson vs. Sarment,* 153 Cal. 524, at 531 (96 Pac. 315, 126 Am. St. Rep. 91), it is said:

" 'Apart from other considerations, two essential elements of an estoppel are, 1. That the party asserting it must have been ignorant of the true state of facts and of the means of acquiring knowledge of them, and 2. That he must have relied upon the statement or admission of the party whom he seeks to bind by such statement or admission.'

"In *Maggini vs. West Coast Life Ins. Co.,* 136 Cal. App. 472, at page 479 (29 Pac. (2d) 263), it is said:

" 'The defense of estoppel arises from section 1962, Code of Civil Procedure: "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it; . . ." It is essential that the party pleading an estoppel must be ignorant of the true state of facts and must have been intentionally led to alter his course to his injury by the act of the other. (10 Cal. Jur., p. 626.) Hence there can be no estoppel of one who has no knowledge of the facts as there can be no claim of estoppel by one who knows his representations are false and knows that the other party is ignorant of their falsity.' "

In the case of *Moriarty v. California Western States Life Ins. Co.,* 22 Cal. App. 2d 260, 70 P. 2d 684, the Court reiterates the rule as follows:

"But the particular factors necessary before applying the doctrine in any action are set forth in the leading case of *Biddle Boggs vs. Merced Min. Co.,* 14 Cal. 279, at page 367, as follows: 'It is undoubtedly true that a party will, in many instances, be concluded by his declarations or conduct, which have influenced the conduct of another to his injury. The party is said, in such cases, to be estopped from denying the truth of his admissions. But to the application of this principle with respect to the title of property, it must appear, *first,* that the party making the admission by his declarations or conduct, was apprised of the true state of his own title; *second,*

that he made the admission with the express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud; *third,* that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge, and, *fourth,* that he relied directly upon such admission, and will be injured by allowing its truth to be disproved.' We have shown above that Mr. Benjamin had no authority on behalf of the defendant to waive any provisions of the policy. Plaintiff points to nothing showing he had authority to estop the defendant. Assuming, solely for the purposes of this decision, that he did have authority, there is no evidence he did not speak truly. There is no evidence the deceased did not know all of the facts as completely as did the defendant. No single fact appears wherein or whereby, if an estoppel arose, the deceased would have been estopped, but it is a cardinal rule that an estoppel must be mutual. (10 Cal. Jur. 627.)"

Applying the rule in the *Moriarty* case last quoted, *supra,* and applying it to the evidence in this case, there is not an iota of testimony that anyone even remotely connected with Appellees in any manner at all discussed the fifteen months limitation, or said or did anything to induce Appellants from commencing their suit within the time limited, nor in any manner even suggested that the fifteen months limitation would be waived, and there is not even a suggestion that anything whatsoever prevented Appellants from commencing their suit at any time after the letters of August 30, 1946, in which the Appellants were notified that Appellees were standing strictly upon the terms and conditions of the policies.

How, we ask, can it be claimed that Appellees waived any of the conditions of the policies when they were at all times emphatically, and in writing, insisting upon a full compliance therewith?

The trial court found, upon ample evidence, that:

(1) That Appellants' action was not commenced within the time provided for in the statutory policy. [Tr. Vol. I, p. 64, lines 12-15.]

(2) That the Defendants, or any of them, did not waive said provisions. [Tr. Vol. I, p. 64, lines 10-11.]

(3) That Plaintiffs' failure to file suit within the time required by the provisions of said policies, and each of them, was not induced, by any representation or conduct of Defendants, or any of them, or by anyone acting for or in their behalf. [Tr. Vol. I, p. 62, lines 14-19.]

(4) That Defendants, or any of them, are not estopped to rely upon said provisions. [Tr. Vol. I, p. 64, lines 12-13.]

These findings were all findings of ultimate fact, and not conclusions of law as the *ipse dixit* of Appellants in their brief would have it.

> *Woldson v. Bauman,* 132 F. 2d 622, at page 624 (9th Cir.).

These findings were based upon ample testimony, and a statement under these circumstances of the ultimate facts found by the Court in itself should be sufficient to establish that the Court's conclusions of law and judgment are amply supported by the facts found, and were not erroneous, but the only judgment that could be rendered under the testimony.

The Evidence Sustaining the Court's Findings Against Waiver or Estoppel.

As previously indicated, Appellants ask this Court to try this case *de novo,* to pass upon disputed questions of fact, to draw inferences therefrom contrary to those drawn by the trial court, to test the credibility of witnesses not before them, and to make findings contrary to those made by the trial court.

Appellants ask this Court to ignore the rule laid down in Rule 52(a) of the Federal Rules of Civil Procedure, which provides that "findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses," and the time honored rule in this jurisdiction that "the judge or jury which has seen and heard the witnesses is better qualified to weigh their testimony than is a reviewing tribunal, and findings of fact of the trial body will not be set aside unless clearly erroneous."

> *Western Union Telegraph Co. v. Bromberg,* 143 F. 2d 288 (9th Cir.).

Notwithstanding this extraordinary position, Appellants have not in a single instance in their brief, in quoting testimony which they claim support their plea of estoppel, quoted all of the testimony, but have ignored entirely the contradictory testimony, the testimony on cross-examination and impeachment, and have quoted only isolated bits which they believe, or at least claim, support their plea. While Appellees believe that this method of presenting

an appeal from a factual case is an imposition on the court and an added burden upon Appellees, not contemplated by the rules, they will, at the risk of unduly lengthening this brief and to the end that the appellate court may have the true factual situation before it, review, not isolated portions of the testimony, but *all* of the evidence on the points upon which Appellants claim their plea of estoppel was based.

Appellants' claim of estoppel is based, not upon the record, but upon certain conversations claimed to have been had by Appellant Quon with three different parties connected with Appellees and conversations claimed by Appellants' witness Tang to have been had with a party connected with one of the Appellees.

Appellant Quon claimed to have had certain conversations at El Centro with Carl Quigg, adjuster for all the Appellees in handling the matter, and Herbert Loudermilk, local agent at El Centro, and with Si Carey, local agent for Appellee Niagara Insurance Company, at Brawley, California, and Appellants' witness Tang testified to having conversations with Chester Stutt, manager of the San Francisco office of Appellee New Zealand Insurance Company. The parties referred to, Herbert Loudermilk and Chester Stutt, both died some time prior to the trial of the case and the significance of the testimony of Quon and his witness with reference to their conversations with these parties will be hereinafter noted.

Testimony Relating to Conversations With Carl Quigg.

Since, as the Court found [Tr. Vol. I, p. 60, lines 22-26; p. 61, lines 7-12], that Carl Quigg was at all times after the fire appointed as the sole adjusting representative of all the Appellees to act in all matters and things in relation to the loss and the contracts of insurance, and Appellants and their attorney at all times from three days after the fire were advised thereof, he is the only possible person who could have waived the provisions or estopped the companies from relying thereon and, for that reason, the alleged statements made by him will first be noticed. Appellants in their brief half-heartedly attack this finding of the Court that Quigg was the sole adjusting representative and Appellants knew it, but this fact is so amply established by the evidence that there can be no mistake about it. Quigg testified that he was, immediately after the fire, employed by all of the Appellants as their adjusting representative. The only persons in any manner connected with the Appellees that Appellant Quon came in contact with were Quigg, Carey and Loudermilk. Quon himself testified that the day after the fire Loudermilk told him that he had reported the fire and that the companies were appointing Mr. Quigg to represent them. Carey told him the same thing. Quon knew Quigg and had adjusted several losses with Quigg before. And, last but not least, Appellants in their sworn complaint allege the very fact and reiterate it in their amended complaint filed after practically all of the testimony was in, to the

following effect: "that defendants have at all times since said fire had one agent or employee at all times represent all of said defendants in correspondence and discussing the matter with plaintiffs." [Tr. Vol. I, p. 14, lines 15-17; p. 45, line 9.]

This reference to a single designated agent of all the Appellees is made throughout Plaintiffs' complaint and reiterated in the amended complaint filed after the trial had commenced. [Tr. Vol. I, p. 16, line 26; p. 17, line 9; p. 19, line 6; p. 20, line 17; p. 21, lines 21, 24; p. 22, line 15; p. 23, line 2.] Mr. Quigg was the only person mentioned, either in the pleadings or the trial, who represented all of the Appellees and obviously the only person referred to in the pleadings as Appellees' "designated agent."

The evidence shows, without contradiction, that Mr. Quigg was appointed the sole adjusting representative for all of Appellees. That the day following the fire Appellant Quon was so advised by the two local agents, that Quigg met Quon at the site of the fire on the second day after the fire. That at that time he looked over the debris with Quon, asked if he had any information pertaining to the values, and advised him that it would be necessary to make statements pertaining to the inventories. He also advised him that it would be necessary to protect the salvage. [Tr. Vol. II, p. 134, lines 13-26.] The day following, or the third day after the fire, Appellant Quon came to Mr. Quigg's office at El Centro with Mr. Williams, a practicing attorney of El Centro whom Mr. Quigg knew, and at that time and in the presence of Mr. Werner, who also testified in corroboration, Mr. Quon stated to Mr. Quigg that Mr. Williams would represent him in the entire matter of the adjustments. [Tr. Vol. II, p. 136, lines

10-12.] At that time Mr. Quigg stated to Mr. Williams, in Quon's presence, practically the same thing that he had told Mr. Quon the day before. He told him the requirements under the insuring contracts and what he would have to have in order eventually, if there was an approval of the claim, and the details pertaining to it. He did not tell them that he would assist them in the presentation of the claims. He merely pointed out the terms of the contract. [Tr. Vol. II, p. 137, lines 7-12, 25-26; p. 138, lines 1-5.] He had no other conversations with Quon or Williams other than incidental conversations not particularly regarding the loss settlement. [Tr. Vol. II, p. 136, lines 15-17.]

Following the conversation above related with Quon at the site of the fire and the conversations above detailed with Quon and Williams in his office the next day, Quigg had no conversations with either Quon or Williams except one telephone conversation later in which Williams asked for copies of the policies, which Quigg furnished him by mail.

Following these two conversations, and the one telephone conversation, Quigg had absolutely no communication from Quon or Williams, except that Quon, through Williams, furnished Proofs of Loss to Quigg by mail on July 26, 1946, and amended Proofs of Loss on August 9, 1946, to which Quigg replied by letter rejecting the Proofs and advising the Appellants that the companies were standing on the terms of the contracts. [Pltfs. Ex. 1D, *et al.*] Following the sending of this letter of August 30, 1946, Mr. Quigg had no communication whatsoever from the Appellants or their attorney, either oral or in writing, until the middle of November, 1947, several months after the fifteen months limitation had expired, when Quon

telephoned Quigg at San Diego and was advised by Quigg that the Appellees had denied liability. [Tr. Vol. II, p. 142, lines 14-26, *et al.*]

Appellants, on pages 8 and 9 of their brief, present what apparently is their only claim of acts or declarations of Quigg upon which they base an estoppel against Appellees. They state that Quon testified that on or about June 20, 1946, Quigg stated to Quon, "Well, let it go now until you have income tax case now on the government and they are going to take your money anyway, so why don't you wait until later—Why don't you wait until the income tax case is finished first, then settle this claim," and state that Quigg did not deny this conversation.

The answer to this is that the statement made is literally not true, and the trial court so found. While Mr. Quigg did not categorically deny this particular statement, he did, as above quoted from the record, relate all of the transactions and conversations had with either Quon or his attorney on the only two times that he met and talked with either one of them, to wit, on or about May 29 and 30, 1946, and states that nothing was said relating to the loss other than he related, other than incidental conversation not having to do with the loss. Furthermore, by Quon's own clear testimony and admissions on cross-examination, he established conclusively that the alleged conversation of June 20, 1946, did not take place, and the Court, under the evidence, could not have found other than that no such a conversation did not take place.

Quon testified on cross-examination as follows:

> "Q. Well, did you talk with Mr. Quigg at any time after you employed Mr. Williams to act as your attorney? A. No, I don't think I remember I did. All I remember, I talked to Mr. Quigg a couple of

times on the empty lot there, and talked to him about these claims." [Tr. Vol. II, p. 81, line 25, to p. 82, line 3.]

It is undisputed and so found that Mr. Williams was employed on May 30, 1946, and that no conversations were had with Quon after that date, so it is obvious that, this being true and found by the Court, no such conversation as related could have occurred on June 20, 1946.

There is not an iota of evidence of any act or conduct of Mr. Quigg estopping the Appellees or waiving the terms of the policies, and nothing said or done by Mr. Quigg was in any manner calculated to induce the Appellants to refrain from bringing action, or to lead him to believe that the fifteen months provision of the policies would not be insisted on. On the contrary, Mr. Quigg, at the first and only meeting with Quon and his attorney, advised them that they would be required to comply with the terms and conditions of the policies and confirmed this in writing by the letter of August 30, 1946.

Claim Relating to Statements of Si Carey.

On pages 10, 11 and 12 Appellants quote some testimony of witness Quon of a conversation had with Si Carey, of Brawley, California, but again do not give the Court the entire evidence relating to this party and we again find it necessary to supply the missing and controlling facts.

The testimony of Quon was received over Appellees' objections, the Court reserving ruling, that it was incompetent and hearsay and not binding on Appellees, as no authority had been shown on the part of Mr. Carey to make any statements subsequent to the issuance of the policy binding upon the Appellees. The Court later ruled

that the objection was well taken and that Carey did not have authority to bind the Appellees and that the alleged conversations did not establish an estoppel.

It was conceded that Mr. Carey was the agent of Appellee Niagara Fire Insurance Company for the purpose of countersigning and delivering one policy in suit. However, Carey had no authority, either in law or in fact, to bind the Appellees, or any of them, after the execution and delivery of the policy, and particularly not in this instant.

Carey was not acting or assuming to act for Appellants, or any of them, as the record without dispute amply shows. In the first place, according to the Appellant's own testimony, the day following the fire Carey advised him that Mr. Quigg was handling the adjustment. Mr. Quigg so advised him. The Appellants knew and so alleged in their complaint that Mr. Quigg was the man handling the adjustment, and, moreover, there is a bit of evidence which Appellants conveniently overlook in their brief which establishes without controversy that Carey or Carey Brothers were not acting or assuming to act for the Appellees, or any of them.

Appellant Quon testified that in September, 1946, he telephoned Carey Brothers at Brawley, from San Francisco, and asked them to get copies of the Proofs of Loss which his attorney, Mr. Williams, filed with Mr. Quigg from the office of his bookkeeper, Mr. James H. Hicks.

On September 28, 1946, Carey Brothers wrote Appellant Quon at San Francisco, sending copies of the Proofs of Loss, and in the letter stated as follows:

> "From our telephone conversation we assume you are taking this case away from Mr. Williams, however we suggest if such assumption is correct you

immediately contact an attorney in San Francisco, giving him details and then having him contact company offices in San Francisco and do the necessary *inasmuch as this office has no knowledge as to what has gone on in your settlement of claims."* (Italics ours.) [Pltfs. Ex. No. 10.]

The trial court found that the conversation alleged did not establish an estoppel and that Carey had no authority to speak for the Appellants, or any of them, in the transaction, and said findings were amply supported.

Appellees' Claim Regarding Conversation With Herbert Loudermilk.

Appellants, on pages 15 to 17 of their brief, refer to two alleged conversations which Quon claimed to have had with one Herbert Loudermilk.

A rather significant indication of Appellants' attitude regarding the facts of this case is evidenced by the testimony regarding the alleged conversations with Loudermilk. Although Appellants, in their complaint, alleged that the Appellees had, at all times since the fire, one agent at all times represent all of the Defendants in corresponding and discussing the matter with Appellants, and this one person was identified as the witness Carl Quigg, and Appellants throughout their complaint constantly referred to the said designated agent they produced the testimony of the alleged conversations with Herbert Loudermilk as the conversations referred to in their complaint, over Appellees' objection of incompetency and hearsay because the authority to make statements subsequent to the loss binding upon the Appellees had not been shown, and because not within the issues, to which the Court reserved a ruling. It was shown without dispute that Herbert Loudermilk had died

some time prior to the trial, and obviously Appellees could not rebut the testimony. However, the trial court did not believe this testimony by reason of the said Appellant's impeachment and his evasiveness on cross-examination. [Tr. Vol. II, p. 98, lines 12-18.] And, moreover, concluded that it was incompetent because no authority to speak in the matter for Appellants had been shown. [Tr. Vol. I, p. 50, lines 10-20.]

It was shown without dispute that Loudermilk was not acting for Appellees or any of them in connection with the matter, that he did not purport to act, that he notified Appellant Quon the day after the fire that he was not acting, and that Mr. Quigg was coming to act for the Appellees and the evidence amply shows that Mr. Quigg was the only person authorized to act in the matter of the loss and negotiations connected therewith.

Furthermore, the alleged conversations do not even remotely assume to waive the fifteen months limitations or to estop the companies to rely thereon. And further, according to this testimony, one of the conversations occurred about ten days after the fire and the other about a month and a half after the fire, and Appellants did not act upon them if they had any tendency whatsoever to induce any action, but, on the contrary, thereafter filed their claim and amended claim, which was rejected with the notification that the Appellees were standing strictly upon the terms of the policies.

Furthermore, the trial court was entitled to reject this testimony in its entirety due to the failure to show authority to make the statements, the impeachment and evasiveness of said Appellant, and the fact that it was an alleged conversation with a deceased person.

See:

Herbert v. Lankershim, 9 Cal. 2d 409, 71 P. 2d 220;

Thompson v. Machado, 78 Cal. App. 2d 870, 178 P. 2d 838.

Claim of Alleged Conversations With Chester Stutt.

Again we have here the case of Appellants' witness estifying to an alleged conversation with a deceased person. The same situation regarding the Plaintiffs' complaint and the designation of the agent referred to, as was n the case of Loudermilk is true here. Appellants, in heir complaint [Tr. Vol. I, p. 20, lines 10-26], allege that n the Fall of 1947 (several months after the expiration f the fifteen months limitation) they contacted an agent f Defendants in San Francisco, California, without esignating any particular agent or agent for any particular Appellee, and were advised that this agent, whoever he was, would communicate with the designated agent n Southern California handling the matter. It was not ntil the trial was under way that Appellants filed an mended complaint and there alleged, "that in the Fall of 946 one Tye Tang acting for Plaintiffs contacted the eneral manager of the New Zealand Insurance Company. Tr. Vol. I, p. 45, line 20.] Mr. Quigg testified that Mr. Stutt was manager of the New Zealand Insurance Company, San Francisco office, and that San Francisco vas the head office of the New Zealand, and testified that Mr. Stutt had died prior to the commencement of the trial.

Obviously, in view of Appellants' concealment of the erson to whom they were referring in their pleadings, the esignation of the Fall of 1946 as the time of the conersation and after the Statute of Limitations had run,

later in the amended complaint changed to 1946, and the general designation as an agent of Defendants, Appellees were not advised and could not controvert the testimony on this point. However, as shown in the discussion of matters relating to Loudermilk, the Court was not required to believe this testimony.

Moreover, this testimony went in under the objection and reserved ruling of Appellees that it was incompetent because of no authority shown. As discussed under the discussion of the conversations with the previous parties, this objection was proper and the Court later ruled that the testimony was not competent and the alleged conversation did not establish an estoppel.

Taking the testimony of Mr. Tang as Appellants' only witness outside of Appellant Quon, it is to the following effect; that in September of 1946 he, at Quon's request, called on the telephone to the office of the New Zealand Insurance Company and was answered by someone who said he was Mr. Stutt.

Over Appellees' objection of incompetency because no authority to bind Appellees had been shown, he testified that the person purporting to be Stutt told him that he had heard something about the case and he was going to wire somebody in Imperial Valley and get some information and let him know. [Tr. Vol. II, p. 120, line 16, to p. 121, line 3.] About a month later he called and was again answered by someone who said he was Mr. Stutt and was told over the phone by this person that he had heard that the case was still under investigation and if he heard anything definite he was going to call him. [Tr.

Vol. II, p. 121, lines 15-23.] About several months later, round February, he called again and again talked with he man purporting to be Mr. Stutt and was told that he hadn't heard anything definite except that the case vas still under investigation and he also told me that he vould not pay Mr. Quon until he get the recommendation rom the adjuster and if he pays probably the rest of the ompanies will pay too." [Tr. Vol. II, p. 122, lines 2-6.] And again he testified that several months later, he hought around May of 1947, he again called and was dvised by the same person that, "and he told me there is othing he can do except he has to wait until they reach decision by the adjuster." [Tr. Vol. II, p. 122, lines 2-13, 25-26.] That Appellant Quon was present in his ffice at all of the times of these alleged telephone conersations and he communicated them to Quon.

While the trial court was not obliged under the circumtances to believe that these alleged conversations took lace, there is no iota of testimony that Mr. Stutt, if he id make the statements, was acting or purporting to act or any of the Appellees. According to the testimony of 'ang he, Stutt, in each of the conversations, advised Tang hat the matter was entirely in the hands of the adjuster.

Moreover, these conversations occurred long before the fteen months had expired and there is not a suggestion n any of them that Mr. Stutt had anything to do with the djustment or would do anything regarding it other than o let Mr. Tang know what he heard about it, and far from eing any inducement to Appellants not to commence suit, vas a direct statement that it was very questionable vhether the losses would be paid.

Authorities on Agency.

While, as we believe we have demonstrated above, none of the parties whose acts, declarations or conduct are claimed as the basis for the estoppel, did or said anything in any manner calculated or designed to induce Appellants not to commence their action within the time limited by the policies, there is no evidence that, if they had done so, they had authority to bind the Appellees to a waiver or estoppel of said provisions, with the exception of Mr. Quigg who did nothing but stand upon the strict terms of the policies.

While the facts show that all of the three other parties referred to did not act or purport to act in the matter, but on the contrary always referred the Appellants or their representatives to Quigg, and their lack of actual authority is completely established by the evidence, it is submitted also that they had no ostensible authority whatsoever to act in the manner sought to be established by Appellants.

All of the testimony relating to the various acts of the three parties other than Quigg was received with ruling reserved over Appellees' objection of no authority shown and the Court ruled that no authority had been shown and that the Appellees were not bound by any acts or declarations of said parties, even if they had constituted an estoppel. Appellants offered no evidence whatsoever as to the authority of any of these parties, and there was no testimony as to their status other than Appellees' admission that they were authorized to countersign and deliver policies.

It is fundamental that one who seeks to bind a principal by the acts of an agent, or alleged agent, has the burden of proof of showing, not only (a) that the party was an agent, but (b) that the agent at the time alleged was acting within the course and scope of his employment.

The fundamental rules are epitomized in the following uotation from *Hill v. Citizens National Trust & Savings ank,* 9 Cal. 2d 172, 69 Pac. 853, as follows:

"A third person, such as appellant, is not compelled to deal with an agent, but if he does so, he must take the risk. He takes the risk not only of ascertaining whether the person with whom he is dealing is the agent, but also of ascertaining the scope of his powers. The rule is cogently stated in 1 Mechem on Agency, second edition, section 743, page 527, as follows: 'An assumption of authority to act as agent for another of itself challenges inquiry. Like a railroad crossing, it should be in itself a sign of danger and suggest the duty to "stop, look and listen." It is therefore declared to be a fundamental rule, never to be lost sight of and not easily to be overestimated, that persons dealing with an assumed agent, whether the assumed agency be a *general* or *special* one, are bound at their peril, if they would hold the principal, to ascertain not only the fact of the agency *but the "nature and extent of the authority,* and in case either is controverted, the burden of proof is upon them to establish it."' (Ernst v. Searle, 218 Cal. 233, 240, 22 Pac. (2d) 715, 717.)" (Italics ours.)

And. of course, the general rules of agency is as pplicable to insurance as to any other matter.

14 *Cal. Jur.* 454.

It is said in 45 *Corpus Juris Secundum* 624:

"An insurance company may be estopped to deny liability, or a ground for forfeiture or avoidance of the policy may be waived, by the acts and statements of an *authorized* officer or agent of the company, but the acts constituting a waiver on estoppel must be

those of an officer or agent whose acts under the circumstances are binding on the company." (Citing *Alexander v. General Ins. Co.,* 22 Fed. Supp. 157 (S. D. Calif.); *Rice v. Calif. Western States Life Ins. Co.,* 21 Cal. App. 2d 660, 70 P. 2d 516; *Kugler v. I. A. C. of State of Calif.,* 63 Cal. App. 308, 218 Pac. 472.)

And in 45 *Corpus Juris Secundum* 626:

"But to bind the company the acts or representations must have been made by a person acting as an agent of the company within the real or apparent scope of his authority. *It is not every agent of insurer, however, who may waive important* contract provisions."

And in 46 *Corpus Juris Secundum* 284:

"Such waiver cannot be made by an unauthorized agent." (Citing *Thompson v. Amer. Fid. Co.,* 102 N. E. 699, 215 Mass. 460.)

And the agent, when he would bind a principal, must be engaged at the time in and about the business of the principal.

Palo Alto Assn. v. First National Bank, 33 Cal. App. 214, 224;

Wittenbrock v. J. A. Parker, et al., 102 Cal. 93, 101;

Renton Holmes & Co. v. George Monnier, 77 Cal. 449, 453.

It has been held, and we find no authorities to the contrary where the question has been raised, that authority to countersign and deliver policies carries with it no ostensible authority to act for the companies after the loss, and particularly no authority to waive the limitation clause.

See:

Collins v. Home Ins. Co. of New York, 167 Atl. 621 (Pa.);

Fernando v. Milwaukee Mechanics Ins. Co., 142 Pac. 693 (Wash.);

Hessler v. North River Ins. Co., 207 N. Y. Supp. 529;

Bowlin v. Hekla Fire Ins. Co., 31 N. W. 859, 36 Minn. 433;

Mitchell v. Western Fire Ins. Co., 261 N. W. 300;

Graham v. Niagara Fire Ins. Co., 32 S. E. 579 (Ga.);

Barry & Finan Lbr. Co. v. Citizens Ins. Co., 98 N. W. 761 (Mich.);

Ermentrout v. Girard Fire & Marine Ins. Co., 65 N. W. 635 (Minn.);

Harrison v. Hartford Fire Ins. Co., 59 Fed. 732;

Urbaniak v. Firemen's Ins. Co., 116 N. E. 413, 121 Mass. 439.

Conclusion.

In conclusion, Appellees respectfully submit that the findings of the trial court were not only amply sustained by the evidence, but that there was no competent evidence to the contrary, and that the Court's conclusion of law was correct and the Court did not err in entering judgment for Appellees and submit that the judgment of the trial court should be affirmed.

Respectfully submitted,

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